

## MEMORANDUM

**TO:** District of Columbia Board of Zoning Adjustment

**FROM:** Stephen Cochran, Zoning & Special Projects Planner  
*JL* Joel Lawson, Associate Director Development Review

**DATE:** February 2, 2023

**SUBJECT:** BZA Case 20867, 1934 35<sup>th</sup> Place, NW, for a use variance and two special exceptions to make legal an existing basement accessory apartment in the R-20 zone.

### **I. OFFICE OF PLANNING RECOMMENDATION**


The Office of Planning (OP) recommends **approval** of the following variance relief:

- A Use Variance from U § 201 pursuant to C-204.1 and X § 1002 (single-family dwelling permitted; non-conforming flat existing; continuation and expansion of flat proposed)
- An Area Variance from the lot occupancy requirements of D-§ 1204.1 pursuant to X § 1002 (60% permitted; 69.8% existing; 70% proposed)
- An Area Variance from the rear yard requirements of D § 1206.2 pursuant to X § 1002 (20 ft required; 11 feet existing, 7.7 feet proposed)

For a building in the R-20 zone, Subtitle D Section 5201.2 only enables the Board to grant special exception relief for ‘a residential building with only one (1) principal dwelling unit on a non-alley lot.’ Although the zoning regulations permit a principal unit and an accessory unit on a lot in this zone by special exception, in this case the owner purchased the property with a valid CofO for a “flat”, or a building with two principal residential units. For a flat in the R-20 zone a use variance is required for expanding a non-conforming structure and area variances are required for the requested expansion of lot occupancy and reduction of rear yard depth.

### **II. LOCATION AND SITE DESCRIPTION**

Address	1934 35 <sup>th</sup> Place, NW
Applicant	Alexandra Wilson, attorney, on behalf of Stella Ajello, owner.
Legal Description	Square 1296E, Lot 312
Ward / ANC	2 / 2E
Zone	R-20 – permits detached, semi-detached, and row buildings on small lots, and includes areas where row buildings are mingled with detached buildings and semi-detached buildings.
Historic District	none

Lot	Generally flat rectangular corner lot measuring 50.05 feet on the north, on the south side of what is known as both Whitehaven Parkway, N.W. and U Street, N.W.; 18.47 feet on the east, on the west side of 35 <sup>th</sup> Place, 50.0 feet on the adjoining property line to the south; and 16.14 feet along the 15-foot wide alley to the west.
Location	
Existing Development	The property is improved with a two-story row building used, and possible developed, as a residential flat, which is a non-conforming use in the R-20 zone, but for which the building has had a Certificate of Occupancy since 1958 or before. <sup>1</sup> The building has an enclosed footprint of approximately 560 square feet. It faces east onto 35 <sup>th</sup> Street and also has windows on its north side along Whitehaven Parkway / U Street and on its rear facing a public alley. The rear yard is 11-feet deep and there is no parking space. There is a 1-bedrom, 1-bath unit on each of the two floors. The outside entry to both units is a common front door on 35 <sup>th</sup> Place that opens into a shared vestibule. From there separate apartment doors lead to each respective unit. The first floor unit has direct access to the back yard. The second floor unit has access to the yard via a set of steps from a rear door and small porch on that level.
Surrounding Neighborhood Character	The nearby neighborhood is one-family residential in use, primarily in row buildings. One block to the east is the Hardy School and field and its parking lot which is used by the Georgetown Flea Market on weekends. Wisconsin Avenue, with a mix of medium density commercial and residential uses, is two blocks to the east.

<sup>1</sup> In addition to the certificates of occupancy in the case file, the building is labelled “Burleith Flats” on Google Earth.

Adjacent Properties	The applicant's building is one of a row of what were originally similar two-story buildings, although others appear to be one-family dwellings rather than flats. Several buildings in that row have added 3 <sup>rd</sup> stories in the last decade. The adjoining property to the south, at 1932 35 <sup>th</sup> Pl. NW, is improved with a single-household 3-story row building, as is the building at 1930 35 <sup>th</sup> Place. To the east, across 35 <sup>th</sup> Place is a three-story corner row building. Holy Rood cemetery is to the north, atop a hill. To the west, across an alley is the front yard of the north-facing two-story row, at 3526 Whitehaven Parkway.
Proposed Development	<p>The Applicant proposes the following: 1) At the back of the second story, replace the existing porch and straight run of stairs to the back yard with a 7 ft. x 5.5 ft. deck and a circular stair to the yard. While the area of the enclosed portion the second floor would remain the same, the deck and stairs would add 0.2% to the floor's lot occupancy and would decrease the depth of the rear yard by 3.3 feet; 2) Add a third story with a rear wall setback 5-feet from the second story's rear wall. There would be a deck and circular staircase within the 5-foot rear setback, leading to a new roof deck set back 5-feet from the 2<sup>nd</sup> story rear wall and enclosed with parapet walls on three sides.</p> <p>Proposed alterations to the front façade are conforming to the zoning regulations and would essentially match those made at 1930 and 1932 35<sup>th</sup> Place.</p> <p>Both dwelling units would continue to be entered from the single front door on 35<sup>th</sup> Place. The first floor would have a 1-bedroom/1 bath unit. The second and third floors would comprise a two-bedroom, 2.5 bath unit, with a roof deck.</p>

### III. ZONING REQUIREMENTS and RELIEF REQUESTED

Zone – R-20	Regulation	Existing	Proposed <sup>2</sup>	Relief
<b>Use</b> U Chapter 2, Use Group C	Single household dwelling permitted, but not flat	C of O for, and use as a Flat	Expansion of the existing Flat	<b>Use Variance Requested</b>
Lot Width D § 1202 (for row building)	20 ft.	18.47 ft.	Same	Existing non-conformity
Lot Area D § 1202	2,000 sq. ft. min.	865 sq. ft.	Same	Existing non-conformity
Height D § 1203	35 ft. and 3 stories max.	20 ft. , 2 stories	31.75 ft., 3 stories	None Required
<b>Lot Occupancy</b> <b>D § 1204</b>	60% max. 70%, usually by special exception but by variance for non-conforming use	69.8% %	70% only for 2 <sup>nd</sup> floor	<b>Area Variance Requested</b> , due to existing non-conformity of use.

<sup>2</sup> Information provided by the Applicant, Exhibit 24, May 16, 2022.

<b>Zone – R-20</b>	<b>Regulation</b>	<b>Existing</b>	<b>Proposed<sup>2</sup></b>	<b>Relief</b>
Front Setback D § 1205	Consistent with adjacent properties	Consistent	Consistent	None Required
<b>Rear Yard D § 1206</b>	20 ft. min.	11 ft.	7.7 ft.	<b>Area Variance Requested</b> , due to existing non-conformity of use
Side Yard D § 1207	None required	0 ft.	0 ft.	None Required
Pervious Surface D § 1208	20% min.	Not provided	Not provided	None Required
Parking C § 701	None required	0 spaces	0 spaces	None Required

#### **IV. OFFICE OF PLANNING ANALYSIS**

The current use on the property is a flat, a nonconforming use in the R-20 zone even though the use on this lot has a valid CofO which dates back to at least 1958, and possibly to when the building was constructed. Subtitle C § 204.1 states that “A *nonconforming use of land or structure shall not be extended in land area, gross floor area or use intensity; and shall not be extended to portions of a structure not devoted to that nonconforming use at the time of enactment of this title.*” The applicant proposes to extend the existing non-conforming use to a new third floor. The second-floor rear porch and staircase to the back yard that would be replaced with an uncovered metal deck and circular stair would marginally increase the second floor’s lot occupancy by 0.2% and would decrease the rear yard’s depth by 3.3 feet.

If the applicant’s building were used as a conforming single-household residence like the nearby rowhouses, the third floor could be added by-right and the lot occupancy and rear yard relief could be considered as special exceptions. However, because the applicant proposes to retain the building’s use as a flat in the R-20 zone, the expansion of that use to a new floor requires a use variance. Because the use would remain non-conforming, the proposed occupancy increase would require an area variance, as would the proposed decrease in the rear yard’s depth resulting from the replacement deck and stairs.

The Board is authorized to grant the use variances pursuant to Subtitle X § 1000 and the area variances pursuant to Subtitle X § 1000. Each request must meet a three-part variance test, which is analyzed below.

##### **A. Use Variance for Expansion of a Non-Conforming Use – Subtitle C § 204.1**

- 1. An applicant for a use variance must prove that there are exceptional attributes of specific piece of property such as exceptional narrowness, shallowness, or shape at the time of the original adoption of the regulations, or exceptional topographical conditions or other extraordinary or exceptional situations or conditions of the specific piece of property.**

The long-time use of the property in accordance with the certificates of occupancy that have been issued at least since 1958, before the adoption of the current zoning regulations, constitutes the primary exceptional condition with respect to the expansion of a non-

conforming use.

The applicant states that an exceptional condition exists by virtue of the applicant's property historically and currently being a flat and therefore requiring the type of relief for an expansion that would be needed by no other nearby property. For over 64-years the building has had valid Certificates of Occupancy (C of O) as a flat. (See Exhibit 24D). The C of O in the case record was issued in 1958 and a marginal note by the 1958 reviewer indicates the building may have originally been constructed and used as a flat, with appropriate certificates of occupancy, since its construction in 1935. The applicant purchased the property with the understanding that it has a valid C of O as a flat. The applicant states it has searched for, but been unable to find, any other existing certificates of occupancy for flats in nearby blocks. This would seem to establish the applicant's building's use as a flat as both unique, and an exceptional condition of the property.

**2. As a result of this exceptional attribute or condition, "the strict application of a zoning regulation would result in exceptional and undue hardship upon the owner of the property".**

The applicant states that due to the owner's reasonable understanding of the C of O for a flat the owner made the reasonable conclusion at purchase time that the building has long been determined to be a flat. However, as the owner discovered after purchase, that existing use is a non-conformity in the zone and that use non-conformity precludes the applicant from making any additions to the property without a use variance. That is because of the restrictions Subtitle D § 5201.2 places on expanding any residence in the R-20 zone other than a single-household dwelling.

To make the proposed additions without use variance relief the applicant would have to eliminate one of the units and make the building into a single-household dwelling, which it apparently has never been. The applicant states that denial of the requested variance or the conversion to a single-household residence would constitute an undue hardship to the owner. Losing an existing independent residential unit would significantly decrease the value of the asset and negatively affect financing options for needed building renovations. Reconfiguration of one apartment into an accessory unit would also result in an undue hardship to the owner. That restriction would also be contrary to the owner's expectations at time of purchase, based on the building's valid C of O.

**3. The relief would not result in substantial detriment to the public good and would not substantially impair the intent, purpose and integrity of the zone plan.**

There would be no substantial detriment to the public good or impairment of the zoning regulations from granting the requested use variance. It would enable the applicant to improve the building's physical condition and appearance while retaining the same use it has had for at least 64 years. With only one front entrance and no side entrance, the building would continue to appear as if a single-family house. The renovated design would match that of the former two-story houses on the street that have been remodeled into three-story houses.. Because the actual use would not change, granting the relief should result in no substantial impact on noise, parking or traffic.

**B. Area Variance from the Lot Occupancy Requirements of D-1204.1 and the Rear Yard Depth Requirements of D 1206.2 pursuant to X § 1000, for a building that is in the R-20 zone but is not a conforming Single-Household Residence.**

- 1. An applicant for an area variance must demonstrate that the property exhibits exceptional narrowness, shallowness, or shape at the time of the original adoption of the regulations, or exceptional topographical conditions or another extraordinary or exceptional situation or condition.**

The long-time use of the property in accordance with the certificates of occupancy that were issued before the adoption of the regulation constitutes the primary exceptional condition with respect to lot occupancy and rear yard. It was not unreasonable for the applicant to assume that 64 to 87 years of the property's use with a C of O as a flat would enable requests for lot occupancy or rear yard depth relief to be considered as special exceptions, as they can be for the surrounding single-household residences.

- 2. The strict application of a zoning regulation would result in peculiar and exceptional practical difficulties to the owner of the property.**

The applicant states that denial of the requested variances for a 0.02% increase in lot occupancy and a decrease of 3.3-feet of rear yard depth would create practical difficulties in replacing an existing rear exit from the second floor with a more modern and safe means of secondary egress from what would become the principal unit in the building.

- 3. Is the proposal in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and would it appear to tend to affect adversely, the use of neighboring property?**

Enabling the applicant to marginally expand lot occupancy and decrease the rear yard would not, in this case, be inconsistent with the general purpose and intent of the Zoning Regulations and Zoning Maps and would not tend to affect the use of neighboring property adversely.

Subtitle D Section 1200.1 states that part of the intent of the R-20 regulations is to retain the area's quiet residential character and to control compatible nonresidential uses. If the relief were granted, the applicant's building would retain the same use it has legally had for at least 64 years.

The applicant has demonstrated that even after the proposed changes to the building, it would continue to appear as a single-household residence while retaining its use as a flat. The slight increase in lot occupancy and decrease in rear yard depth should have no undue impact on the light or air available to adjoining or nearby properties, nor on the privacy of use or potential for enjoyment of the adjoining or adjacent properties.

**V. COMMENTS OF OTHER DISTRICT AGENCIES**

The District of Department of Transportation filed a letter at Exhibit 20 noting no objection to the requested relief. Comments from other District agencies had not been filed to the record at the time this report was completed.

## **VI. ADVISORY NEIGHBORHOOD COMMISSION**

ANC 2E had not filed to the record at the time OP completed this report.

## **VII. COMMUNITY COMMENTS**

The owners of the adjoining building at 1932 35<sup>th</sup> Place and the adjacent property at 3526 Whitehaven Parkway have filed letters in support of the application (Exhibits 18 & 19). There were no other community comments at the time OP completed this report.